

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

QWUAN Q. GREEN,

Defendant-Appellant.

UNPUBLISHED

September 20, 2002

No. 231407

Oakland Circuit Court

LC No. 99-169380-FC

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317, assault with intent to commit great bodily harm less than murder,¹ MCL 750.84, carrying a concealed weapon (CCW), MCL 750.227, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to imprisonment for 35 to 70 years for the murder conviction, 4½ to 10 years for the assault conviction, 2 to 5 years for the CCW conviction, and two years for each of the felony-firearm convictions, to be served consecutively with and preceding the imprisonment for the murder and assault convictions. We affirm defendant's convictions, but remand for resentencing.

Defendant first argues that prosecutorial misconduct denied him a fair trial. We disagree. Generally, we review de novo allegations of prosecutorial misconduct, but we review for clear error the trial court's factual findings. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Because defendant failed to object to some of the challenged comments at trial, we review those claims for outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Watson, supra*.

¹ The record reflects that although originally charged with assault with intent to commit murder, MCL 750.83, the jury found defendant guilty of the lesser offense of assault with intent to commit great bodily harm less than murder, MCL 750.84. The judgment of sentence incorrectly provides that defendant was convicted of the charged offense.

Prosecutorial misconduct issues are decided case by case and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000) (citations omitted).]

"No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.* The trial court's instruction to the jury that it is to decide the case on the evidence alone and that the arguments of attorneys are not evidence may dispel any unfair prejudice caused by the prosecutor's comments. See *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

First, defendant claims that the prosecutor engaged in misconduct by deliberately interjecting evidence of a shooting that occurred at "Big Daddy's" that involved defendant. Defendant claims that the prosecutor's questions implied that this incident concerned a drug deal. According to defendant, this incident was not relevant to the instant case and was inadmissible under MRE 404(b). "A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused." *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). However, "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence. The prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant." *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999) (citations omitted).

Having reviewed the challenged conduct, we find that the prosecution did not engage in misconduct by interjecting evidence of the "Big Daddy's" incident. First, defendant has not demonstrated bad faith on the part of the prosecutor in cross-examining defendant regarding this incident. The prosecutor may have believed that defendant opened the door to this line of questioning when he brought up the "Big Daddy's" incident or the prosecutor may have believed that evidence of the "Big Daddy's" incident was relevant to defendant's motive for asking another person to take the blame for the shooting in the instant case. Additionally, defendant has not demonstrated that he was prejudiced by the challenged testimony. Although the "Big Daddy's" testimony showed that defendant was involved in drugs, defendant had already testified that he had bought drugs before the shooting in the instant case, so the reference to drugs in the "Big Daddy's" testimony did not prejudice defendant. Moreover, there was overwhelming evidence of defendant's guilt in this case and the testimony about the "Big Daddy's" incident did not change the outcome of the case. The testimony, including defendant's own testimony, shows that defendant told the driver to stop the car, defendant got out, defendant fired his gun in the victim's direction, and the victim was killed. The most important issue is whether defendant intended to shoot somebody or was trying to shoot over their heads. Defendant argues that, if the jury would not have heard defendant's testimony about the "Big Daddy's" incident, they might have believed defendant's assertion that he was only trying to scare Wilkerson by firing his gun above Wilkerson's head. We find that, because the "Big

Daddy's" testimony did not demonstrate that defendant had a tendency to kill, this testimony did not influence the jury regarding whether defendant intended to kill the victim or only intended to scare Wilkerson. Defendant has not shown that, without the "Big Daddy's" testimony, the jury would have believed defendant and would not have convicted him of second-degree murder.

Further, we have reviewed the complained of portion of the prosecutor's closing argument and find, contrary to defendant's assertion that the prosecutor used the "Big Daddy's" testimony to show that defendant committed the crime, that the prosecutor argued that the "Big Daddy's" incident was defendant's motive for asking someone else to take the blame for the shooting in the instant case. Moreover, any prejudice to defendant resulting from the prosecutor's references to the "Big Daddy's" incident in the closing argument could have been cured by a timely objection and curative instruction. *Schutte, supra*. We find that defendant is entitled to no relief on his claim of prosecutorial misconduct with regard to the elicitation of the "Big Daddy's" testimony.

Defendant also claims that the prosecutor engaged in misconduct by denigrating defense counsel. Again, we disagree. "A prosecutor cannot personally attack the defendant's trial attorney because this type of attack can infringe upon the defendant's presumption of innocence." *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996).

Defendant points to numerous instances when the prosecutor allegedly denigrated defense counsel. Having reviewed each proffered instance, we find that defendant was not prejudiced by the prosecutor's comments. Although the prosecutor's comments imply that he was annoyed with defense counsel's objections, his comments did not denigrate defendant's counsel or rise to the level of denying defendant a fair trial by undermining defendant's presumption of innocence. The prosecutor did not personally attack defense counsel or make specific comments about defense counsel's character or competence. The prosecutor did not use these comments to his advantage in the trial or imply that defendant was guilty because his attorney was incompetent. "[I]n the haste and heat of a trial it is humanly impossible to obtain absolute perfection, and of necessity some allowance must be made in determining whether impromptu remarks are held to be prejudicial." *People v Lawton*, 196 Mich App 341, 354; 492 NW2d 810 (1992), quoting *People v DeLano*, 318 Mich 557, 569; 28 NW2d 909 (1947). Further, the trial court instructed the jury that the lawyers' statements, arguments, and questions are not evidence. The trial court's instruction to the jury that it is to decide the case on the evidence alone and that the arguments of attorneys are not evidence may dispel any prejudice caused by a prosecutor's comments. See *Green, supra* at 693. This instruction in the instant case cured any prejudice toward defendant from the prosecutor's comments.

Next, defendant argues that the trial court improperly scored the sentencing guidelines by assessing him fifty points for Offense Variable (OV) 6, MCL 777.36 (intent to kill or injure another individual), without relying on information not presented to the jury. "Appellate review of guidelines calculations is limited, and a sentencing court has discretion in determining the number of points to be scored provided there is evidence on the record that adequately supports a particular score." *People v Dilling*, 222 Mich App 44, 54; 564 NW2d 56 (1997); see also *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000).

A defendant may be assessed fifty points for OV 6 when, among other reasons, he had the premeditated intent to kill. MCL 777.36(1)(a). Defendant argues that, because the jury

found defendant guilty of second-degree murder, which does not contain an element of premeditated intent to kill, the trial court improperly scored fifty points for OV 6. The trial court must score OV 6 consistent with the jury verdict unless it has information that was not presented to the jury. MCL 777.36(2)(a). Because the trial court did not mention its reliance on any information not presented to the jury in finding a score of fifty appropriate, *People v LeMarbe (After Remand)*, 201 Mich App 45; 505 NW2d 879 (1993), remand is necessary for either an explanation of the information not presented to the jury that the trial court relied on scoring fifty points for OV 6, or for rescored defendant twenty-five points for OV 6 and resentencing defendant in light of the corrected offense variable score.²

Next, defendant argues that the trial court erred in finding that there were substantial and compelling reasons for departing upward from the sentencing guidelines and abused its discretion in imposing the sentence for second-degree murder.

[T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion. [*People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000) (*Babcock I*), quoting *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995) (citations omitted).³]

Under the legislative sentencing guidelines, the trial court may depart from the guidelines if it “has a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). “The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight.” *Armstrong, supra*, citing MCL 769.34(3)(a), (b). The factors relied on by the trial court in departing from the guidelines must be objective and verifiable. *Babcock I, supra* at 75.

Here, the trial court's first reason for departing from the sentencing guidelines was “because of the intentional nature of shooting off the weapons in a residential neighborhood on a

² To the extent that defendant asserts that he is entitled to resentencing before a different judge, his argument is abandoned on appeal because he gives no reasons in support of his argument. “A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim.” *People v Harmon*, 248 Mich App 522, 533; 640 NW2d 314 (2001), quoting *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999). “Issues insufficiently briefed are deemed abandoned on appeal.” *People v Van Tubbergen*, 249 Mich App 354, 364; 642 NW2d 368 (2002).

³ This Court recently questioned the abuse of discretion standard set forth in *Babcock I*. See *People v Babcock*, 250 Mich App 463; 648 NW2d 221 (2002).

surprise, a surprise attack if you would, drive-by” Defendant first argues that this reason already was taken into account in scoring OV 1, OV 2, and OV 6. “Factors that are considered in scoring the guidelines cannot be used a second time to justify a sentencing departure unless the court finds ‘from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.’ ” *Babcock I, supra* at 79, quoting MCL 769.34(3)(b). The trial court assessed twenty-five points for OV 1 (aggravated use of a weapon), which provides that “[a] firearm was discharged at or toward a human being . . . ,” MCL 777.31(1)(a); five points for OV 2 (lethal potential of the weapon possessed), which provides that “[t]he offender possessed a pistol, rifle, shotgun, or knife . . . ,” MCL 777.32(1)(c); and fifty points for OV 6 (intent to kill or injure another individual), which provides, in pertinent part, that “[t]he offender had premeditated intent to kill . . . ,” MCL 777.36(1)(a). We find that these offense variables did not adequately take into account that the shooting occurred in a residential neighborhood and was done by surprise. Therefore, the trial court did not consider the offense variable factors a second time in justifying an upward departure from the sentencing guidelines.

Defendant also argues that this reason was not objective and verifiable and shows that the trial court improperly sentenced defendant on the court’s independent finding that defendant was guilty of first-degree murder. In *People v Krause*, 185 Mich App 353, 358; 460 NW2d 900 (1990), overruled in part on other grounds *People v Fields*, 448 Mich 58 (1995), this Court defined what is “objective and verifiable,” stating that “the facts to be considered by the judge in determining substantial and compelling reasons must be actions or occurrences which are external to the minds of the judge, defendant and others involved in making the decision and must be capable of being confirmed.” “A trial court may not make an independent finding of guilt and then sentence a defendant on the basis of that finding.” *People v Gould*, 225 Mich App 79, 89; 570 NW2d 140 (1997).

Contrary to defendant’s argument, we find that the trial court’s reason was objective and verifiable and was not based on an independent finding that defendant was guilty of first-degree murder. In stating its reasons for departing from the guidelines, the trial court did not state that defendant premeditated the killing, but only stated that defendant intentionally shot his gun in a residential neighborhood, which defendant admitted at trial. The trial court’s reason does not imply that defendant premeditated the killing or even intended to kill anybody, but only states that defendant intended to shoot his gun, which is consistent with the evidence and defendant’s conviction for second-degree murder. We find no error here. *Babcock I, supra* at 75.

The trial court’s second reason for departing from the guidelines was because of “the fact that there was vindictiveness on behalf of the [d]efendant, that he was a grudge holder.” Defendant argues that there is no evidence that defendant held a grudge against Wilkerson and that this reason for departing from the guidelines is not objective and verifiable because it is merely the trial court’s subjective value judgment of defendant. We agree. The testimony at trial may have led the trial court to the conclusion that defendant acted out of vindictiveness and was a grudge-holder. However, there is nothing on the record to objectively verify that this vindictiveness is part of defendant’s personality. The trial court’s conclusion that defendant is vindictive is a subjective opinion that the trial court formed after considering the evidence. Therefore, this factor was not objective and verifiable and should not have been considered in determining whether there substantial and compelling reasons existed for a departure from the

guidelines. Consequently, fifty percent of the basis for the upward departure was improper. Under these circumstances, resentencing is necessary. See *People v Hegwood*, 465 Mich 432, 437, n 10; 636 NW2d 127 (2001).

Finally, defendant argues that the judgment of sentence should be corrected because it erroneously states that he was convicted of assault with intent to commit murder when the jury actually convicted him of the lesser offense of assault with intent to do great bodily harm less than murder. We agree. On remand, the trial court shall correct the judgment of sentence to reflect defendant's actual conviction for assault with intent to do great bodily harm less than murder. MCR 6.435(A); *Hoffman v Spartan Stores, Inc*, 197 Mich App 289, 293-294; 494 NW2d 811 (1992).

Defendant's convictions are affirmed, but the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Jessica R. Cooper

/s/ Joel P. Hoekstra

/s/ Jane E. Markey